Supreme Court, U.S.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PIPER JAFFRAY, INC. and MARVIN GEISNESS,

Petitioners,

vs.

IRENE HALLIGAN, as Executrix of the Estate of THEODORE H. HALLIGAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether judicial review of arbitration awards under a standard allowing vacatur based on arbitrators' "manifest disregard of the law *or the evidence or both*" is consistent with the strong federal policy favoring arbitration, as embodied in the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Piper Jaffray, Inc. (which is now known as U.S. Bancorp Piper Jaffray Inc.) hereby discloses that its corporate parent is U.S. Bancorp, which is a publicly traded corporation. Petitioner has no nonwholly owned subsidiaries.

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Piper Jaffray, Inc. and Marvin Geisness respectfully petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 148 F.3d 197 (2d Cir. 1998), and is reprinted at 1a-7a. The district court's opinions of April 14, June 10, and June 16, 1997 — respectively, denying Respondent's petition to vacate the arbitral award, granting Petitioners' cross-petition to confirm the award, and dismissing Respondent's Complaint on grounds of *res judicata* – are not reported and are set forth at 18a-40a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was issued on July 9, 1998. The court denied Petitioners' petition for rehearing or suggestion for rehearing in banc by order dated October 23, 1998. *See* 41a. This petition is being timely filed within 90 days of that order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Respondent first invoked federal court jurisdiction in the case under 28 U.S.C. §§ 1331 (because the case involved an alleged violation of a federal statute) and 1332 (because Respondent is a citizen of the State of New York, Petitioner Piper Jaffray, Inc. is a citizen of the States of Minnesota and Delaware, and Petitioner Marvin Geisness is a citizen of the State of Minnesota).

STATUTE INVOLVED

The Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* That statute is reprinted in its entirety at 43a-54a.

STATEMENT OF THE CASE

This case arises out of an arbitration proceeding brought by Theodore Halligan ("Mr. Halligan"), a former salesperson of Petitioner Piper Jaffray, Inc., against Piper Jaffray and one of its employees, Petitioner Marvin Geisness (referred to collectively hereinafter as "Piper Jaffray" or "Petitioners"). In 1993, Mr. Halligan filed an arbitration claim with the National Association of Securities Dealers alleging, *inter alia*, that he was terminated because of his age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq.* The arbitration lasted more than two years and was hotly contested. The hearings themselves, before a panel of three experienced attorney-arbitrators, lasted 26 days, during which 25 witnesses were examined and cross-examined (18 for Mr. Halligan, 9 for Piper Jaffray) and more than 240 exhibits were introduced. The parties presented opening and closing arguments and submitted post-hearing briefs. *See* 29a.

On October 9, 1995, during the pendency of the arbitration hearings, Mr. Halligan died. His widow and executrix, Irene Halligan ("Mrs. Halligan" or "Respondent"), continued the arbitration on the estate's behalf. On March 19, 1996, the arbitrators issued a written award denying all of Mr. Halligan's claims. Mrs. Halligan filed a petition to vacate the award on grounds, *inter alia*, that the arbitrators engaged in "manifest disregard of the law" in rejecting her husband's claims. Piper Jaffray both opposed the petition and cross-moved to confirm. Mrs. Halligan also commenced a federal court action solely against Piper Jaffray, alleging a violation of the ADEA based on her husband's alleged discharge. Piper Jaffray moved to dismiss the complaint.

In three separate written opinions issued in April and June 1997, the district court denied Mrs. Halligan's petition to vacate,

granted Piper Jaffray's motion to confirm, and, having issued those two decisions, dismissed Mrs. Halligan's ADEA complaint, which raised the identical claims that had been advanced in the arbitration, on grounds of *res judicata*. On July 9, 1998, a panel of the Second Circuit reversed all three of the district court's decisions. The basis of its holding was the court's conclusion that the arbitrators, who had ruled in favor of Piper Jaffray but without issuing a written explanation, had "manifestly disregarded the law or the evidence or both." *See* 16a. The court specifically noted that the arbitrators had been properly instructed as to the applicable standards of law governing Mr. Halligan's age discrimination claim. *See* 15a.

The court of appeals denied Piper Jaffray's petition for rehearing or suggestion for rehearing in banc on October 23, 1998.

REASONS FOR GRANTING THE WRIT

The standard of judicial review announced by the court of appeals — allowing vacatur of arbitral awards based on the arbitrators' "manifest disregard of the law *or the evidence or both*" — is unprecedented in the scores of reported federal appellate decisions reviewing arbitral awards under the FAA, and creates a regime of judicial review highly destabilizing to the arbitration process. The court's approach expands the focus of the "manifest disregard" standard beyond arbitrators' conclusions of law and into their findings of fact, albeit without the deference that characterizes appellate review of fact-finding by a court or jury. This case presents this Court with the opportunity to decide whether so intrusive a standard of review is consistent with the strong national policy favoring arbitration, as reflected in the FAA, and with the interests of efficiency and finality that arbitration promotes.

I.

THE COURT OF APPEALS ANNOUNCED A NEW STANDARD OF JUDICIAL REVIEW OF ARBITRAL AWARDS THAT CONFLICTS WITH THE DECISIONS OF EVERY OTHER COURT OF APPEALS

A. The "Manifest Disregard of the Law" Standard

In asking the district court to vacate the arbitrators' award in this case, Respondent argued, *inter alia*, that the arbitrators engaged in "manifest disregard of the law" when they rejected her husband's claims. The "manifest disregard of the law" standard, while not an explicit basis for judicial review under the FAA, is a clearly recognized ground for vacatur of arbitrators' decisions, pre-dating the enactment of the FAA and consistently adhered to ever since. *See First Options v. Kaplan*, 514 U.S. 938, 942 (1995) (noting that parties are "bound by [an] arbitrator's decision not in 'manifest disregard' of the law") (citing *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), *overruled on other grounds, Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989)); *Wilko*, 346 U.S. at 436-37 ("the interpretations of the law by the arbitrators[,] in contrast to manifest disregard[,] are not subject, in the federal courts, to judicial review for error in interpretation").

Under this common law standard, judicial vacatur of awards is permitted only where the arbitrators consciously disregarded an applicable rule of *law*, in that they were made aware of the rule but chose not to apply it. The Second Circuit's prior articulation of the standard is both typical and widely followed: "The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986). Every other court

of appeals has adopted the same or a substantially similar approach. *See, e.g., Prudential-Bache Secs. v. Tanner*, 72 F.3d 234, 237-38 (1st Cir. 1995); *United Transp. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 379 (3d Cir. 1995); *Gallus Invs., L.P. v. Pudgie's Famous Chicken, Ltd.*, 134 F.3d 231, 233-34 (4th Cir. 1998); *Trans Chem. Ltd. v. China Nat'l Mach. Import and Export Corp.*, 161 F.3d 314, 314 (5th Cir. 1998); *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 135-36 (6th Cir. 1996); *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994); *UHC Mgmt. Co. v. Computer Sciences Corp.*, 148 F.3d 992, 998 (8th Cir. 1998); *Barnes v. Logan*, 122 F.3d 820, 821-22 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1385 (1998); *U.S. Energy Corp. v. Nukem, Inc.*, Nos. 96-1532, 97-1332, 1998 WL 738336, *2-3 (10th Cir. Oct. 22, 1998); *Gianelli Money Purchase Plan and Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir.), *cert. denied*, 119 S. Ct. 540 (1998); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1487 (D.C. Cir. 1997).

The rationale behind this deferential approach lies in the judicial, and ultimately legislative, encouragement of arbitration as an alternative to litigation. As this Court declared in 1855:

> Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. . . . If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation.

Burchell v. Marsh, 58 U.S. (17 How.) 344, 349 (1855). This Court, accordingly, has long made clear that courts reviewing arbitral awards "are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact," nor do they "sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36, 38 (1987); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 n.4 (1991) ("judicial scrutiny of arbitration awards necessarily is limited") (quoting *Shearson*, 482 U.S. at 232); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) ("judicial review of an [arbitration] award is more limited than judicial review of a trial").[1]

An essential aspect of this approach to judicial review has been that the courts consider only whether there has been manifest disregard "of the law" and not "of the evidence." Because arbitration shifts only the forum for the resolution of a dispute, not the substantive law, *see, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only

1. The "manifest disregard" standard thus mirrors the extremely narrow statutory bases for judicial review contained in the FAA. Under section 10 of the statute, an award may be vacated only if it was "procured by corruption, fraud, or undue means"; if there was bias on the part of the arbitrators; if the arbitrators engaged in misconduct that prejudiced the rights of the parties, such as refusing to postpone the hearing for good cause; or if the arbitrators exceeded their powers. *See* 9 U.S.C. § 10(a). Under section 11, the court may modify an award if it reflects a material miscalculation of figures or a material mistake in its description of any person, thing or property; if the award is based on a matter not submitted to the arbitrators or "not affecting the merits of the decision"; or if it is "imperfect in matter of form not affecting the merits of the controversy." *Id.* § 11.

submits to their resolution in an arbitral, rather than a judicial, forum."), the very legitimacy of arbitration would be undermined if arbitrators were allowed to create their own law or to decline to apply law of which they were made aware. The "manifest disregard" standard ensures that courts serve as a watchdog over the arbitrators' legal conclusions (even though subject to a great degree of deference).

There is no corresponding rationale for judicial patrolling of arbitrators' *factual* findings. Reviewing courts have no special competence in that area; if anything, the opposite is true, since it is the arbitrators, as triers of fact, who see and hear the witnesses and have the unique ability to make the credibility judgments so essential to informed fact-finding. *See generally Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) ("only the [factfinder] can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said").

This rationale has particular force in employment discrimination actions such as this case. As noted above, Mr. Halligan alleged that his employment with Piper Jaffray was terminated because of his age, in violation of the ADEA. While it is a relatively straightforward task to *state* the principles of law governing ADEA claims (and the court of appeals noted that the arbitrators had been properly instructed as to those principles here), it is quite another thing to *apply* them to specific factual circumstances and decide whether a given claimant has proven intentional discrimination by a preponderance of the evidence. That exercise is the unique province of fact-finders, who see and listen to the witnesses. *See generally Pullman-Standard Div. of Pullman, Inc. v. Swint*, 456 U.S. 273, 289 (1982) ("discriminatory intent is a finding of fact to be made by the trial court"); *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997) (summary disposition

disfavored in employment discrimination cases because "the employer's intent is in question"). As the D.C. Circuit has observed, the vast majority of employment discrimination claims "are entirely factual in nature and involve well-settled legal principles," a state of affairs that creates "no adverse impact on the arbitration process" precisely because judicial review of awards is limited to correcting errors of law and not fact. *See Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1487 (D.C. Cir. 1997).

B. The Court of Appeals Departed From the Unanimous View of Other Courts and Created a Split in the Circuits

The federal courts of appeals until now have been unanimous in following an approach that confines review under the "manifest disregard" standard to errors of *law*. They have thus held that, while courts can and must pay close attention to the *legal* underpinnings of arbitral awards, they do not sit to review the wisdom or accuracy of arbitrators' *factual* findings. *See, e.g., Cole*, 105 F.3d at 1487; *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 150 (4th Cir. 1994) (no manifest disregard where "the arbitrators had substantial conflicting testimony which could support a decision for either of the parties . . . [and] the arbitrators may well have chosen to credit evidence presented by defendants"), *cert. denied*, 513 U.S. 1112 (1995); *National Wrecking Co. v. International Bhd. of Teamsters, Local 731*, 990 F.2d 957, 961 (7th Cir. 1993) (courts must enforce awards "even in the face of erroneous findings of fact or misinterpretations of law") (citation omitted); *Denver & Rio Grande W. R.R. v. Union Pac. R.R.*, 119 F.3d 847, 849 (10th Cir. 1997) ("Errors in . . . the arbitrator's factual findings . . . do not justify review or reversal on the merits of the controversy."). The Second Circuit had previously adhered to this position as well. *See Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 892-93 (2d Cir. 1985) ("the fact that an arbitrator

erroneously decided the facts" is "not a ground for vacating an arbitrator's award") (citation omitted).

In this case, however, the Second Circuit conspicuously departed from that unanimity (and from its own prior rule). It altered the existing standard of judicial review to allow consideration of not only whether the arbitrators engaged in manifest disregard of the *law*, but whether they disregarded the law "*or the evidence or both*." In explaining its decision to vacate the arbitrators' award, the court said, in pertinent part, "we are inclined to hold that [the arbitrators] ignored the law or the evidence or both," 16a, later adding, "we are left with the firm belief that the arbitrators here manifestly disregarded the law or the evidence or both," 17a.

This new approach — of reaching beyond the arbitrators' conclusions to examine the relative strengths of each party's position on the facts — is apparent not only in the words the court chose to explain its conclusions, but also in the analysis it used to reach that result. The court's opinion demonstrates inescapably that its decision was based entirely on its disagreement with the arbitrators' weighing of the evidence, not on any perceived refusal by the arbitrators to apply the law. Thus, the court justified its decision with repeated references to what it perceived as the strength of Respondent's case on the facts and the concomitant weaknesses in Petitioners'. It said, for example:

- "During the arbitration hearings, Halligan presented the arbitrators with *very strong evidence* of age-based discrimination."

4a (emphasis added).

- "Quite simply, Halligan presented *overwhelming evidence* that Piper's conduct after Tad Piper became CEO was motivated by age discrimination."

15a (emphasis added).

- "Halligan presented *powerful evidence* of his performance, in the form of quantitative sales rankings and relevant witness testimony."

15a (emphasis added).

- "[T]he circumstantial evidence surrounding his departure . . . is consistent *only* with a finding that Halligan was pushed out of his job."

15a (emphasis added). In addition, the court presented the facts in a manner that frequently overlooked Petitioners' version of events. On the few occasions when it did acknowledge the facts supporting the award, its statements were dismissive and laced with qualifications or disclaimers. *See, e.g.*, 5a ("All Piper personnel denied having made such [age-based] statements, although their testimony was occasionally inconsistent or ambiguous."); 6a (twice describing Piper Jaffray as merely "discount[ing]" Mr. Halligan's evidence rather than as presenting evidence of its own).

Moreover, the court of appeals specifically acknowledged that the arbitrators had been properly advised as to the *legal* standards applicable to Respondent's claim of age discrimination. *See* 15a. The only possible reading of the court's opinion, therefore, is that it created and applied a standard of heightened inquiry into the *factual* underpinnings of arbitral awards. Indeed, despite the parties' straightforward

legal contentions before the arbitrators, there was intense factual disagreement on virtually every material point, including matters as rudimentary as whether Mr. Halligan was fired or voluntarily retired. *See* 15a. Because of this conflicting testimony, the arbitrators were left to decide matters that turned on their assessment of the witnesses' credibility.

Yet the Second Circuit, believing that the arbitrators resolved those factual issues incorrectly, used that disagreement as the basis for vacatur under a "manifest disregard" analysis, thereby assuming for itself a task of fact-finding that has heretofcre been the exclusive province of the arbitrators. Its approach was not even as deferential as a court's review of jury verdicts, in that it resolved every material factual dispute in a manner opposed to, rather than in favor of, the arbitrators' award. *Cf. Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944) (reviewing court must defer to jury's verdict and resolve all factual inferences in favor of it). In so expanding the "manifest disregard" standard, the court placed itself at odds with every other court of appeals that has applied that standard to date.

II.

THE ISSUES PRESENTED BY THIS CASE ARE OF GREAT IMPORTANCE

By articulating a new "manifest disregard of the evidence" standard, the court of appeals called into question the entire, previously well settled area of judicial review of arbitration awards. The decision's effects will ripple throughout *all* arbitrations — not only in employment cases, not only in cases raising statutory claims for relief, and not only in the securities industry. This case is thus of national significance and warrants issuance of a writ of *certiorari*.

In the collective bargaining arena, review of arbitration awards is severely limited in order to foster the national policy favoring "private settlement of labor disputes without the intervention of government." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37 (1987). As this Court has explained:

> Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.

Id. at 37-38. This is especially true with respect to arbitral fact-finding, which is almost entirely insulated from judicial second-guessing. *See id.* at 39 ("improvident, even silly, factfinding" is "hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts").

Until now, the same approach has applied outside collective bargaining, where the rationale for limited judicial review is not the goal of labor peace but the strong national policy favoring arbitration, as embodied in the FAA.[2] This Court has repeatedly observed that the FAA "establishes a 'federal policy favoring arbitration.' " *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); *see also Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (in enacting the FAA, "Congress declared a national policy

2. This Court in *Misco* noted the similarity between judicial review under the FAA and judicial review in the collective-bargaining arena. *See* 484 U.S. at 40-41.

favoring arbitration"); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974) (FAA was enacted in part "to allow parties to avoid 'the costliness and delays of litigation' ") (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)).

Just as permissive judicial review of collective-bargaining arbitration awards would be inconsistent with the national policy favoring arbitration as a means of promoting industrial harmony, so too is judicial review under a "manifest disregard of the evidence" standard sharply at odds with the pro-arbitration objective of the FAA. Rather than signaling the end of a dispute, an arbitral award that is subject to virtually *de novo* scrutiny for factual errors will in reality be just the beginning. "[P]lenary review by a court of the merits [of an arbitration award] would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final." *United Steelworkers of Am. v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 599 (1960). An article cited by this Court in *Wilko* — the case in which this Court first explicitly acknowledged the "manifest disregard of the law" standard and which involved a statutory claim for relief — made the point this way:

> A practice of liberal review thus tends to increase the workload of the courts; not only will cases be transferred from arbitral to judicial tribunals, but also the parties will tend to resort to the courts originally because they will wish to avoid the extra step of an arbitration proceeding.

Note, *Judicial Review of Arbitration Awards on the Merits*, 63 HARVARD L. REV. 681, 681-82 (1950) (cited in *Wilko*, 346 U.S. at 437 n.24); *see also Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993) (narrow judicial review preserves the "twin goals of arbitration": "settling disputes

efficiently and avoiding long and expensive litigation."); Jose A. Cabranes, *Arbitration and U.S. Courts: Balancing Their Strengths*, 70 N.Y. ST. BAR J. 22, 23 (Mar./Apr. 1998) ("Everyone understands that the many advantages of arbitration would quickly evaporate if arbitration proceedings were treated as mere pre-trial hearings-warm-ups for the parties' day in court.").

The facts of this case perhaps best illustrate the deleterious effects of the Second Circuit's ruling. All of arbitration's supposed advantages over litigation — expedition, efficiency, informality — appear hollow in light of this decision. After 26 hearing days, dozens of witnesses and hundreds of exhibits, the court of appeals has effectively ordered the parties to start over and try this case anew. Indeed, the parties are now back before the district court, preparing to begin discovery with respect to the follow-up complaint brought by Respondent's estate through his widow-executrix.[3]

Moreover, the factual errors identified by the court of appeals were not on matters that were uncontested at the arbitration or otherwise "provable" one way or the other. Here, the errors related to the ultimate factual issue: whether Petitioners intentionally discriminated against Mr. Halligan. While there was evidence on this record that, if believed, could have led a reasonable factfinder to conclude that Petitioners had done so, there was also abundant evidence in this vigorously contested arbitration that both contradicted Respondent's position on every point and that affirmatively supported Petitioners. Against this background, the court's application

3. The follow-up complaint asserts the identical claims as were asserted in the arbitration proceedings, albeit against Petitioner Piper Jaffray only. On December 24, 1998, Piper Jaffray served a motion to dismiss the complaint on various grounds or alternatively to compel arbitration. That motion has not yet been decided.

of the new "manifest disregard of the evidence" standard leads to a patently absurd result — suggesting as it does that the evidence in this case was susceptible of only one interpretation, and that the three experienced attorney-arbitrators who actually saw and heard the witnesses somehow erred grievously in coming out the other way. *Cf. Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.").

More broadly, the court's decision leaves parties, arbitrators, and district judges uncertain about the extent to which arbitral factfinding will be insulated from judicial second-guessing. The "manifest disregard of the evidence" standard will become an invitation for every losing party in every arbitration to seek judicial review, in the hope that the reviewing court will conduct its own assessment of the relative strengths of each party's factual presentation. So long as the party seeking vacatur can convince that court that it presented "powerful" evidence or made "a very strong showing" (the characterizations used by the Second Circuit here), the finality of the arbitral award will be lost, and with it the purported savings in time and resources that are widely viewed as the advantages of arbitration over litigation. *See Gilmer*, 500 U.S. at 26, 31 (by agreeing to arbitrate, the parties "trade[ ] the procedures *and opportunity for review* of the courtroom for the simplicity, informality, and expedition of arbitration") (emphasis added).

Additionally, the court's decision markedly departs from the well established judicial reluctance to require that arbitrators prepare written decisions. *See, e.g., Willemijn Houdstermaatschappij, BV v. Standard Microsys. Corp.*, 103

F.3d 9, 13 (2d Cir. 1997) (in the absence of a written opinion, "we must confirm the arbitrators' decision 'if a ground for [it] can be inferred from the facts of case,' " *even if* that ground is "based on an error of fact or an error of law") (citation omitted); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1215 (2d Cir. 1972) ("forcing arbitrators to explain their award even when grounds for it can be gleaned from the record will unjustifiably diminish whatever efficiency the process now achieves"). While the Second Circuit in this case did not hold that the lack of a written opinion is a *per se* basis for vacatur, the logic of its decision virtually compels that conclusion. It stated:

> At least in the circumstances here, we believe that when a reviewing court is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account. Having done so, we are left with the firm belief that the arbitrators here manifestly disregarded the law or the evidence or both.

16a-17a; *see also* 17a ("the absence of explanation may reinforce the reviewing court's confidence that the arbitrators engaged in manifest disregard").

Other than the rare case where the evidence can be realistically interpreted in only one way, an arbitrator's failure to issue a written decision can, on the authority of the Second Circuit's decision, be cited as a factor warranting vacatur, at least where the court is otherwise "inclined" to vacate. Thus, despite its assurances to the contrary, *see* 17a, the court of appeals made clear, in implication if not in words, that arbitrators who decline to issue opinions, especially in closely contested arbitrations, do so at their peril.

In a further weakening of arbitration's structural advantages, the court's decision creates a regime of judicial review for arbitration that is more searching and intrusive than appellate review of factfinding by a jury or trial judge. In the context of jury verdicts, for example, courts must accord great deference to the verdict and resolve all factual inferences in favor of the verdict. *See, e.g., Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944). The same deferential approach is true of appellate court review of a district court's factual findings. *See Anderson*, 470 U.S. at 573. Yet despite the rule that "judicial review of an [arbitration] award is more limited than judicial review of a trial," *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956), the court of appeals's decision harbingers precisely the opposite result. With the license of the "manifest disregard of the evidence" standard, a reviewing court could give arbitral awards virtually no deference at all, choosing instead to vacate for no reason other than that it would have resolved the facts differently.

The decision thus turns on its head the federal policy favoring arbitration, which this Court reaffirmed earlier this Term. *See Wright v. Universal Maritime Service Corp.*, 119 S. Ct. 391, 394-95 (1998). Notwithstanding both the FAA and more recent congressional proclamations of support for and encouragement of arbitration as an alternative to litigation, *see* Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071 (1991) ("Where appropriate and to the extent authorized by law, the use of alternative dispute resolution including . . . arbitration is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title," including the ADEA), the Second Circuit's decision leads courts in the opposite direction.

These effects will be felt regardless of the context in which the arbitration occurs. While this case involves a plaintiff who

submitted his claim to arbitration in the first instance, nothing in either the language or the reasoning of the Second Circuit's decision limits its newly announced rule to those circumstances.[4] Absent a decision from this Court, the Second Circuit's approach threatens the finality of arbitration awards in all contexts — in employment cases and non-employment cases; in cases raising statutory claims and those raising common law claims; in cases with pre-dispute arbitration agreements or post-dispute agreements; and perhaps even in the context of awards rendered pursuant to collective bargaining agreements.

Such a transformation of settled law, if it is to occur at all, should be announced by Congress or this Court. This case accordingly warrants issuance of a writ of *certiorari*.

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4. The Second Circuit spent a great deal of its opinion addressing issues pertaining to mandatory pre-dispute arbitration agreements, such as the form U-4 Mr. Halligan executed in this case. *See* 9a-14a. It ultimately concluded, however, that Mr. Halligan's claim would have been subject to a valid motion to compel arbitration had he attempted to litigate it. *See* 9a, n.2. Because Mr. Halligan did not in fact seek to litigate his claim, but rather proceeded directly to arbitration, the court's lengthy discussion of this issue is *dicta*, and there is nothing in the opinion to suggest that its holding as to the applicable standard of review is limited to the context of mandatory pre-dispute agreements.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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